STATE OF MICHIGAN

COURT OF APPEALS

ROSSEMARY HERRERA, Plaintiff-Appellee,	UNPUBLISHED February 20, 2014
v	No. 317365 Kent Circuit Court
RAUL AQUILES HERRERA-PINA, Defendant-Appellant.	LC No. 12-005913-DM

Before: SAWYER, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

Defendant, Raul Aquiles Herrera-Pina, appeals as of right the trial court's June 24, 2013, judgment of divorce awarding plaintiff, Rossemary Herrera, sole legal and physical custody of the parties' minor child. We affirm.[1]

Plaintiff and defendant were married on January 20, 2009, and had one child. Plaintiff filed for divorce on June 27, 2012, after which the trial court entered a temporary order granting defendant three overnight visits per week, and granting plaintiff four overnight visits per week.

Following a four-day trial, the trial court found that the child had an established custodial environment with plaintiff, but not with defendant. In reaching this conclusion, the trial court found credible plaintiff's testimony that she was the child's primary caregiver, and that defendant had only minimal involvement in the child's life before the parties separated. Next, the trial court found that factors (a), (b), (c), and (k) of the statutory best interest factors found in MCL 722.23 favored plaintiff, and that none of the best interest factors favored defendant. In

[1] We reject plaintiff's claim that this Court lacks jurisdiction because defendant's claim of appeal was not timely filed. Defendant appeals the trial court's June 24, 2013, order. Defendant timely filed a motion for a new trial, which the trial court denied on July 17, 2013. Defendant filed his claim of appeal on July 22, 2013. Under MCR 7.204(A)(1)(b), defendant's claim of appeal was timely.

accordance with the best interest factors, the trial court found that awarding physical custody to plaintiff was in the child's best interest.

With regard to legal custody, the trial court found that the parties were unable to agree on basic child-rearing decisions, such as education and medical care for the child, and that plaintiff should have sole legal custody. Lastly, concerning parenting time, the trial court awarded defendant one overnight visit per week, as well as a full weekend of parenting time on every third full weekend of the month, in addition to a holiday parenting time schedule.

I. CUSTODY

Defendant challenges the trial court's finding as to the child's established custodial environment, its factual findings on several best interest factors, and its physical and legal custody decisions.

A. STANDARDS OF REVIEW

"We employ three different standards when reviewing a trial court's decision in a child-custody dispute." *Frowner v Smith*, 296 Mich App 374, 380; 820 NW2d 235 (2012). "The clear legal error standard applies when the trial court errs in its choice, interpretation, or application of the existing law." *Shulick v Richards*, 273 Mich App 320, 323; 729 NW2d 533 (2006). The trial court's findings of fact "are reviewed pursuant to the great weight of the evidence standard. In accord with that standard, this Court will sustain the trial court's factual findings unless the evidence clearly preponderates in the opposite direction." *Id.* (quotation omitted). The existence of an established custodial environment and the trial court's findings on the best interest factors are findings of fact that we review against the great weight of the evidence standard. *Dailey v Kloenhamer*, 291 Mich App 660, 664; 811 NW2d 501 (2011); *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001). "Discretionary rulings, including a trial court's determination on the issue of custody, are reviewed for an abuse of discretion." *Shulick*, 273 Mich App at 323. In the context of child custody proceedings, "[a]n abuse of discretion exists when the trial court's decision is palpably and grossly violative of fact and logic . . . ." *Dailey*, 291 Mich App at 664-665 (quotation omitted).

B. ESTABLISHED CUSTODIAL ENVIRONMENT

Because a temporary custody order existed in this case, the trial court was required to determine whether an established custodial environment existed with either, both, or neither of the parents. *Bowers v Bowers*, 190 Mich App 51, 53-54; 475 NW2d 394 (1991). "The established custodial environment is the environment in which 'over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort.'" *Pierron v Pierron*, 486 Mich 81, 85-86; 782 NW2d 480 (2010), quoting MCL 722.27(1)(c). "A custodial environment can be established as a result of a temporary custody order . . . ." *Berger v Berger*, 277 Mich App 700, 707; 747 NW2d 336 (2008). The trial court should not "presume an established custodial environment by reference only to the temporary custody order . . . ." *Curless v Curless*, 137 Mich App 673, 676-677; 357 NW2d 921 (1984). Rather, when a temporary custody order exists, the trial court "is required to

look into the actual circumstances of the case to determine whether an established custodial environment existed." *Bowers*, 190 Mich App at 54.

Defendant does not dispute the trial court's finding that an established custodial environment existed with plaintiff. Instead, he argues that the trial court's finding that an established custodial environment did not exist with him was against the great weight of the evidence. We do not agree. The trial court found credible plaintiff's testimony that she was the child's primary caregiver, and that defendant only became involved in the child's life after the parties' separation. We do not interfere with that credibility determination. *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011). Also, the trial court found credible plaintiff's testimony that when the child returned from parenting time with defendant, she was tired and hungry. This demonstrates that defendant did not care for the child's needs to the same degree as plaintiff did. The trial court also noted the significant amount of contentiousness between the parties[2], and given the presenting circumstances, it did not find that defendant's relationship with the child was marked by qualities of security, stability, and permanence. Accordingly, despite the existence of a temporary custody order that gave plaintiff and defendant nearly equal parenting time after their separation, the circumstances of this case revealed that the child did not have an established custodial environment with defendant. Thus, the evidence does not clearly preponderate in the opposite direction of the trial court's finding. See *Shulick*, 273 Mich App at 323.

C. BEST INTEREST FACTORS

Next, defendant challenges the trial court's findings under the statutory best interest factors. To determine the best interests of a child in a custody dispute, this Court looks to the 12 factors set forth in MCL 722.23. See, e.g., *Foskett*, 247 Mich App at 9. Defendant challenges the trial court's findings under factors (a), (b), (c), (d), (e), (j), and (k). We find that the trial court's findings under each of these factors were not against the great weight of the evidence.

Factor (a) concerns "[t]he love, affection, and other emotional ties existing between the parties involved and the child." MCL 722.23(a). The trial court found a preference for plaintiff because it found credible her testimony that she had a stronger bond with the child based on her role as the child's primary caregiver. Defendant argues that the trial court should have found that this factor did not favor either party. We disagree. The trial court found credible testimony that plaintiff was the child's primary caregiver, and that she had a stronger bond with the child than defendant did. We will not disturb that credibility determination. *Shann*, 293 Mich App at 305. Thus, the trial court's finding that the love, affection, and other emotional ties favored plaintiff was not against the great weight of the evidence. See *Shulick*, 273 Mich App at 323.

Factor (b) concerns "[t]he capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any." The trial court found that both parties had the capacity to provide

[2] The parties' contentiousness required parenting time exchanges to take place at the police department.

the child with guidance on religion and education, but concluded that this factor favored plaintiff because of her role as the child's primary caregiver. Defendant argues that this factor should not have favored either party because of the trial court's finding that both parties could provide the child with guidance on education and religion. We disagree. In addition to focusing on the capacity and disposition of the parties to give the child guidance on education and religion, factor (b) also considers "[t]he capacity and disposition of the parties involved to give the child love [and] affection . . . ." MCL 722.23(b). Here, plaintiff was the child's primary caregiver, she had a closer bond with the child, and had a greater capacity and disposition to give the child love and affection. Consequently, the trial court's findings under this factor were not against the great weight of the evidence. See *Shulick*, 273 Mich App at 323.

Under factor (c), which considers "[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care . . . and other material needs," MCL 722.23(c), the trial court found that both parties had the capacity to provide for the child "in a general sense," but that plaintiff should be favored under this factor because of her greater involvement in the child's medical care. Plaintiff took the child to a majority of her medical appointments, and defendant's involvement in the child's medical care was minimal. Moreover, when defendant was involved in the child's medical care, plaintiff testified that defendant attempted to harass and manipulate her more than he attempted to care for the child, which the trial court found credible. For instance, defendant cancelled one of the child's medical appointments without plaintiff's knowledge, initially opposed a hearing test for the child, and he harassed plaintiff at one of the child's medical appointments in violation of a personal protection order (PPO). On this record, we cannot conclude that the evidence clearly preponderates in the opposite direction of the trial court's decision. See *Shulick*, 273 Mich App at 323. In reaching this conclusion, we reject defendant's contention that the trial court erred because it did not consider his testimony that he had the same medical condition as the child, and thus, would be more sensitive to her medical needs. When making its findings, the trial court need not comment on every fact in evidence. *Kessler v Kessler*, 295 Mich App 54, 65; 811 NW2d 39 (2011). Furthermore, despite the fact that defendant had the same medical condition as the child, the record reveals that defendant was not involved in the child's medical care to the same degree as was plaintiff.

Defendant also challenges the trial court's findings under factor (d). MCL 722.23(d) requires the trial court to consider "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." The trial court found no preference for either party under this factor. This finding was not against the great weight of the evidence. Although plaintiff moved the child out of the family home after the couple's marital relations broke down, defendant had spent a significant time away from the family home preceding that event. Defendant also sought, but did not obtain, new employment outside of the state. Further, both parties changed the child's daycare without any warning to the other. Thus, both parties took actions that were inconsistent with maintaining a stable and continuous environment for the child. As such, the trial court's finding that this factor did not favor either party was not against the great weight of the evidence. See *Shulick*, 273 Mich App at 323.

Defendant also challenges the trial court's findings under factor (e), which requires the trial court to consider "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e). The trial court found no preference for either party on this

factor because both plaintiff and defendant were in transition. Defendant argues this factor should have favored him. We disagree. Plaintiff moved out of the marital home and became pregnant shortly after the parties' separation. Defendant, meanwhile, sought employment outside of the state and considered moving to a new school district if he stayed in Michigan. The trial court's finding that factor (e) did not favor either party because both parties faced instability was not against the great weight of the evidence. See *Shulick*, 273 Mich App at 323.

Next, defendant challenges the trial court's findings under factor (j). Factor (j) requires the trial court to consider "[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents." MCL 722.23(j). The trial court found no preference for either party under factor (j) because "[b]oth parties need to work on encouraging and facilitating a close and continuing parent/child relationship between [the child] and the other parent." Defendant argues that this factor should have favored him. We do not agree. The record reveals that both parties took actions to hinder the other's relationship with the child. For instance, defendant alleged that plaintiff abused/neglected the child; there was no proof of these allegations presented at trial. Plaintiff, meanwhile, initially refused to tell defendant where the child was living after she removed the child from the marital home. Plaintiff also refused to allow defendant to exercise parenting time when he was late to a parenting time exchange. Consequently, both parties took actions that demonstrated the lack of an ability to facilitate and encourage a relationship between the child and the other parent, and the trial court's decision to find no preference for either party under this factor was not against the great weight of the evidence. See *Shulick*, 273 Mich App at 323.

Lastly, with regard to the best interest factors, defendant challenges the trial court's findings under factor (k), which requires the trial court to consider domestic violence. The trial court found a slight preference for plaintiff under this factor because defendant was verbally abusive and manipulative toward plaintiff. Defendant argues that this factor should not have favored either party because plaintiff's testimony lacked credibility. The trial court found plaintiff's allegations were credible, and we do not disturb that finding. *Shann*, 293 Mich App at 305. As such, we do not conclude that the evidence clearly preponderated in the opposite direction of the trial court's findings on this factor. See *Shulick*, 273 Mich App at 323.

D. PHYSICAL CUSTODY

In light of the trial court's findings on the best interest factors, we conclude that the trial court did not abuse its discretion when it found that plaintiff established, by a preponderance of the evidence[3], that granting physical custody to her was in the child's best interests. None of the

[3] See *Pierron v Pierron*, 486 Mich 81, 92-93; 782 NW2d 480 (2010)("[i]f the proposed change would *not* modify the established custodial environment of the child, the burden is on the parent proposing the change to establish, by a preponderance of the evidence, that the change is in the child's best interests"). The trial court found that even if plaintiff had the burden of establishing by clear and convincing evidence that the best interest factors favored granting her physical

trial court's best interest findings was against the great weight of the evidence. Further, none of the best interest factors favored defendant. Additionally, plaintiff was the child's primary caregiver. Thus, we cannot conclude that the trial court's custody decision was "palpably and grossly violative of fact and logic . . ." so as to constitute an abuse of discretion. *Dailey*, 291 Mich App at 664-665 (quotation omitted).

E. LEGAL CUSTODY

We also find that the trial court did not abuse its discretion when it awarded sole legal custody to plaintiff. When considering whether to grant joint custody, MCL 722.26a(1)(a) and (b) direct the trial court to consider the best interest factors set forth in MCL 722.23, as well as "[w]hether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." The parties' personal animosity toward one another is not enough to show that they cannot cooperate on important decisions affecting the welfare of the child. *Nielson v Nielson*, 163 Mich App 430, 434; 415 NW2d 6 (1987). Rather, the parties' inability to cooperate must involve "basic child-rearing issues." *Id.* Here, the record is rife with examples of the parties' inability to communicate with each other on basic child-rearing issues. For instance, both plaintiff and defendant changed the child's daycare without warning to the other parent. Additionally, they rescheduled the child's medical appointments without first communicating with the other party. Further, they disagreed about the child's hearing test, and when defendant attended one of the child's medical examinations, he did so in violation of a PPO and intimidated plaintiff to the point where she contacted security. And, as the trial court found, defendant was manipulative, controlling, and verbally abusive toward plaintiff, thereby making the parties' communications especially difficult. "Therefore, joint custody was not an option, because the record reflected that the parties would not 'be able to cooperate and generally agree concerning important decisions affecting the welfare of the child.'" *Wright v Wright*, 279 Mich App 291, 299-300; 761 NW2d 443 (2008), quoting MCL 722.26a(1)(b). Moreover, given that plaintiff was the child's primary caregiver, and that defendant did not become involved in the child's care until after the parties' separation, we conclude that the trial court's decision to award sole legal custody to plaintiff, rather than defendant, was not grossly violative of fact and logic. See *Dailey*, 291 Mich App at 664-665.

II. PARENTING TIME

Lastly, plaintiff challenges the trial court's parenting time decision. "Although appellate review of parenting-time orders is de novo, this Court must affirm the trial court unless its findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Berger*, 277 Mich App at 716.

MCL 722.27a governs parenting time decisions, and provides, in pertinent part:

> Parenting time shall be granted in accordance with the best interests of the child. It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents. Except as otherwise provided in this

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custody of the child, she sustained that burden. The court noted its "firm belief" that awarding physical custody to plaintiff was in the child's best interests.

> section, parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time. [MCL 722.27a(1).]

Contrary to defendant's assertions, the starting point for the trial court's parenting time order was not the amount of parenting time defendant received under the temporary order, nor was it the friend of the court's recommendation. Rather, as noted above, the trial court was to focus on the child's best interests, which, absent certain circumstances, includes promoting a strong relationship between the child and the parent granted parenting time. MCL 722.27a(1); see also *Berger*, 277 Mich App at 716. The court may consider a number of factors when determining the frequency, duration, and type of parenting time granted, including the existence of any special circumstances or needs of the child and any other relevant factors. MCL 722.27a(6). Here, when determining appropriate parenting time the trial court took into account defendant's work and travel schedule, including the fact that he often has Mondays off, his desire to take the child to church, and the child's developmental needs and need for consistency. Plaintiff has served as the primary caregiver for the child her whole life, and when the child had returned from defendant's parenting time in the past, she was often tired and hungry. Defendant also failed to use the proper skin moisturizer and shampoo on the child, which caused some of her hair to fall out. Defendant cannot establish that the trial court's decision to award parenting time to defendant in the manner it did was a palpable abuse of discretion. See *Berger*, 277 Mich App at 716.

Affirmed.

/s/ David H. Sawyer
/s/ Stephen L. Borrello
/s/ Jane M. Beckering